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Gene R. Nichol, Jr.*

INTRODUCTION

In 1954, Congress decided that the national interest required the abandonment of exclusive government ownership of nuclear facilities and the encouragement of widespread participation by the private sector in the production of nuclear electric power. Since the unique nature of this form of energy production made it impossible totally to rule out the risk of a major nuclear accident and the massive potential liability resulting from such a catastrophe, private industry was unable or unwilling to make the substantial investments necessary to make use of the new technology. Thus, in 1957, the Price-Anderson Act was passed by Congress for the dual purposes of "protecting the public . . . and . . . encourag[ing] the development of the atomic energy industry."[1] The Act places a ceiling of $560 million on the amount recoverable for injury, death or property damage resulting from any single nuclear accident. In the event of such an accident, the Act contemplates certain contributions by the nuclear power industry through private insurance with the remainder of the ceiling figure to be provided by the government. The statute was extended in 1966 and again in 1975 with coverage presently in force until 1987. Specifically, pursuant to section 2210(e) of the Act, Congress assumes the responsibility to take "necessary and appropriate" action in the event of a disaster involving damages in excess of $560 million.[2] Because of the limited liability and the potential scope of injury resulting from a nuclear accident, this portion of the Act has been the focal point

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1. 42 U.S.C. § 2012(i) (1976). The Price-Anderson Act is set forth at *id.* §§ 2012, 2014, 2039, 2073, 2210, 2232, 2239.

2. *Id.* § 2210(e).

of much controversy.

In *Duke Power Company v. Carolina Environmental Study Group*,[3] the United States Supreme Court upheld the constitutionality of the Price-Anderson Act's limitation on liability. This article will examine the decision in *Duke Power* not only because of its timeliness and national import, but because the treatment of the claims put forth by the Carolina Environmental Study Group (CESG) is indicative of the position taken by the Court with regard to other challenges made recently to federal nuclear power policy.[4]

Although faced with troublesome questions of standing and substantive review, the Court had little difficulty overruling the trial court's determination of unconstitutionality in sustaining the validity of the Price-Anderson Act. In the process, the Court employed what can only be characterized as "all deliberate speed" to uphold federal action in the field of nuclear energy. The *Duke Power* decision represents the clearest possible signal to Congress, the Nuclear Regulatory Commission, and the private nuclear power industry, that the federal judiciary will take a "hands-off" posture with regard to any future challenges to nuclear power policy—even if such a posture results in the sacrifice of substantial personal rights purportedly protected by the Constitution.

The challenge to the Price-Anderson limitation in *Duke Power* was brought by certain environmental groups and individuals living near two nuclear power plants being constructed by Duke Power Company at Lake Wylie, South Carolina and Lake Norman, North Carolina. The plaintiffs claimed direct injury as a result of the enactment of the Price-Anderson Act and further alleged that the Act's provisions denied their right to due process and equal protection of the laws. Seeking only declaratory relief, CESG named both Duke Power Company

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3. 438 U.S. 59 (1978).

4. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). In *Vermont Yankee*, the Supreme Court avoided the substantive issue of the environmental impact of the storage of radioactive wastes by focusing on the procedural issues of the case. The Court held that courts may not require unending procedures in excess of those guaranteed by 5 U.S.C. § 553 (1976), even where such procedures are clearly inadequate for a given situation. *Id.* at 548.

In the second part of the opinion, the Court ruled that administrative agencies will not be required to consider energy alternatives proposed by outsiders in reaching nuclear licensing decisions. *Id.* at 552-53. *See also*, Note, 19 SANTA CLARA L. REV. 799 (1979).

and the Nuclear Regulatory Commission as defendants.[5]

Judge McMillan of the Western District of North Carolina ruled that the controversy was justiciable, the plaintiffs had demonstrated standing to sue, and the liability limitations set forth in the Price-Anderson Act ran afoul of the fifth amendment's due process clause and its implied equal protection requirement. The Supreme Court reversed the determination of unconstitutionality after sustaining the trial court's standing decision. As the following discussion indicates, the Burger Court took an uncharacteristically broad view of the standing and justiciability issues in order to make it clear that the Price-Anderson Act would withstand constitutional challenge. Further, the scrutiny, or more properly, the lack of scrutiny with which the Court reviewed the provisions of the Act demonstrates a complete refusal by the Court to seriously consider any challenge to the federal government's role in the nuclear power industry.

STANDING: RUSH TO JUDGMENT

The plaintiffs in *Duke Power* alleged two distinct categories of injuries as their sources of standing. As a result of the very construction and operation of the nuclear plants in their proximity, several immediate adverse effects were claimed. Among these identified present injuries were the production and release of low-level non-natural radiation, a sharp increase in the temperature of the two lakes in question destroying their use for recreational purposes, reduction in property values of land surrounding the plants, interference with the normal use of the waters of the neighboring Catawba River, and "objectively reasonable" fears of a nuclear catastrophe.[6] A second class of potential effects was also found by the trial court including the $560 million damage limitation which would affect plaintiffs in the event of a core melt-down or other major incident.[7]

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5. Carolina Environmental Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203 (W.D.N.C. 1977).

6. *Id.* at 209-10.

7. *Id.* at 214. 42 U.S.C. d 2014(q) (1970) defines a nuclear incident as any occurrence . . . within the United States causing, within or outside the United States, bodily injury, disease, sickness, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of

The very nature of the injuries alleged and the relationship of those injuries to the ultimate claim that the Price-Anderson Act's limitation on liability was unconstitutional presented the Court with several difficult areas of standing analysis.

Recovery for Potential Injuries

The "potential" injuries (losses over and above the Price-Anderson limitation in the event of a major accident) described by the trial court in *Carolina Environmental Study Group v. United States*,[8] are significantly speculative. In the event of a catastrophe the plaintiffs' common-law tort recoveries could not exceed the limitation. The record demonstrated that the likelihood of an accident of such great magnitude, although a real possibility, was small.[9] Congress' commitment to consider compensation in excess of the statutory limitation in the event of such losses also theoretically worked to reduce the chances that the plaintiffs could ultimately go uncompensated. Furthermore, there was no indication that, absent the recovery ceiling, Duke Power Company could reasonably be expected to pay a judgment in excess of $560 million. In light of the continued refusal to base standing on conjectural or speculative injuries, as manifested by such cases as *Roe v. Wade*,[10] *O'Shea v. Littleton*,[11] and *Younger v. Harris*,[12] the Court was reluctant to base its standing determination upon the *potential* effects of a major nuclear disaster.

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source, special nuclear, or byproduct material. . . .

8. 431 F. Supp. 203, 209-10 (W.D.N.C. 1977).

9. *Id.* at 210-11.

10. 410 U.S. 113, 127-29 (1973). In *Roe*, plaintiffs Doe, a childless married couple, attacked the Texas anti-abortion statute on the ground that it would detrimentally affect them should Mrs. Doe become pregnant in the future. Citing Younger v. Harris, 401 U.S. 37 (1971), the Court found the possible future unpreparedness for parenthood too speculative an interest to allow standing. Plaintiff Roe, who was already pregnant, was granted standing.

11. 414 U.S. 488 (1974). Respondents complained that county officials had engaged in prejudicial administration of criminal justice in Alexander County, Illinois. The Court denied standing, holding that it was only speculation whether respondents, if arrested, would be prejudicially served by the county's criminal system.

12. 401 U.S. 37 (1971). Petitioners contended that defendant Harris' conviction under the California Criminal Syndicalism Act would inhibit their right of free speech through fear of prosecution. Standing was denied as the parties had not been arrested or otherwise prosecuted and, therefore, the claimed injury was merely speculative.

As indicated above, however, the plaintiffs proved a full panoply of present effects from the operation of the plants in order to meet the traditional injury-in-fact standing requirement. Damages from low-level radiation and other environmental concerns clearly constituted injury-in-fact under cases such as *Sierra Club v. Morton*,[13] and *United States v. Scrap*.[14] But the injuries alleged by CESG resulted from the construction and operation of the power plants themselves without regard to any accident, much less one with damages in excess of $560 million. The plaintiffs' claim on the merits was that the Price-Anderson limitation is unconstitutional. Accordingly, in order for standing to exist on the basis of the present injuries sustained, the Court not only had to link the allegedly unconstitutional limitation to the operation of the plants, but also to determine the extent to which a relationship is required between the harms alleged for standing purposes and the illegal activity claimed.

Substantial Likelihood of Effective Judicial Relief

Well-settled standing analysis requires not only injury-in-fact but a demonstration that the challenged action actually *caused* the litigant's injury.[15] Stated more specifically, the causation requirement demands that plaintiff show "an injury to himself that is likely to be redressed by a favorable decision."[16] Such a demonstration of substantial likelihood of ef-

13. 405 U.S. 727, 734 (1972). The injury-in-fact in *Sierra Club* was the adverse change to the Sequoia National Forest's aesthetics and ecology that would result from the construction of a proposed ski area. While standing was denied to the club because it asserted no individualized harm to itself or its members, the Court intimated that damage to an area's ecology was justiciable where individualized harm was alleged.

14. 412 U.S. 669 (1973). Plaintiff asserted that the Interstate Commerce Commission's (ICC) orders regarding railway surcharge rates would adversely affect the environment by discouraging the transportation and use of recyclable materials. The Supreme Court upheld the lower court's ruling that the ICC's decision was a major federal action significantly affecting the quality of the human environment. By specifically alleging that the illegal action of the ICC would harm them in their use of the natural resources of the Washington area, plaintiffs elicited a favorable holding that standing is not confined to those who show economic harm since " 'aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society.' " *Id.* at 686 (quoting Sierra Club v. Morton, 405 U.S. at 734).

15. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-21 (1978).

16. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976).

fective judicial relief is based on the reasonable concern that, absent such a showing, the exercise of remedial power by a federal court would constitute a gratuitous exercise and thus be inconsistent with article III limitations.

In *Duke Power*, the Court found that the plaintiffs' injuries could fairly be traced to the Price-Anderson Act. The trial court made extensive findings based on expert testimony and the legislative history of the Act and held that a "but for" causal relationship existed between the Price-Anderson Act and the construction of private nuclear facilities, and also specifically indicated a substantial likelihood that the nuclear plants could be neither completed nor operated absent the limitation.[17] The Supreme Court concluded that the finding was not "clearly erroneous" and therefore considered the injuries claimed substantially likely to be redressed if plaintiffs prevailed on the merits.[18]

Analysis of recent cases involving this aspect of the causation requirement reveals that the Court took a decidedly more lenient standing approach in *Duke Power* than it had in certain past cases in which the Justices were less anxious to reach the merits. In *Linda R.S. v. Richard D.*,[19] the mother of an illegitimate child sought to enjoin the discriminatory application of a Texas statute making any parent who fails to support his children subject to prosecution. State judicial construction had rendered the statute applicable only to married parents. In denying plaintiff standing, the Court ruled that the requested non-discriminatory enforcement would result in the jailing of the child's father, but not necessarily in payment

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17. Carolina Environmental Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. at 218.

There can be no question that the Act has achieved its purpose of stimulating investment. Generation of electricity from nuclear power plants is today a multi-billion dollar industry. 121 CONG. REC. 39059, 39064 (1975) (remarks of Rep. Roncalio) ($80 billion industry). It supplies 8% of the nation's electric power and much larger percentages of the power used in certain regions *(e.g.*, 24% in New England). *Id.* at 40960 (remarks of Sen. Pastore). There are currently some 238 nuclear facilities beyond the planning stage, including 56 that are licensed to operate and 63 that are under construction. *Id.*

The continual pressure that industry representatives have exerted upon Congress for creation and extension of the protection offered by Section 2201(e) attests to its importance to potential investors. *See, e.g.*, H.R. REP. No. 648, 94th Cong., 1st Sess. 2 (1975).

18. 438 U.S. at 74-78.

19. 410 U.S. 614 (1973).

of support.[20] Rather, the end result—support payments—could at best be termed only "speculative." Ultimately, the plaintiff's injury could be redressed only by the independent acts of a third party.

In the questionable *Warth v. Seldin*[21] case, the Court denied standing to several parties challenging allegedly exclusionary zoning ordinances enforced by the town of Penfield, New York. The petitioners contended that their injuries flowed from the exclusionary ordinances that rendered them unable to secure suitable housing in Penfield. In framing the particularized injury requirement, the Court required that petitioners allege facts from which it could reasonably be inferred that, absent the respondent's zoning practices, they would have been able to obtain housing in Penfield. Standing was denied because the realization of the plaintiffs' desire to live in Penfield was dependent on the willingness of third parties to build low cost housing. As a result, petitioners were unable to show *"that prospective relief . . . would . . . remove the harm."*[22]

In *Simon v. Eastern Kentucky Welfare Rights Organization,*[23] the Court demonstrated an even stronger reluctance to grant standing when the activities of third parties would play a part in the accomplishment of effective relief. In *Simon,* several indigents sued the Secretary of the Treasury and Commissioner of the Internal Revenue Service asserting the illegality of a revenue ruling allowing favorable tax treatment to non-profit hospitals that offered only emergency room service to indigents. The indigents claimed that the ruling, reversing prior IRS decisions that had required a hospital to treat indigents to the full extent of its financial capacity, resulted in the denial of hospital access to the poor. After assuming the existence of such a denial, the Supreme Court denied standing,

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20. *Id.* at 617-18.

21. 422 U.S. 490 (1975). The specificity required by the majority in *Warth* would appear to be inconsistent with the prior line of zoning ordinance contests where standing was granted, including: James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (plaintiff need not apply for a building permit where the ordinance in question destroyed the value of the land in order to gain standing). Plaintiffs in both *Hunter* and *James* gained standing by contending the unconstitutionality of allegedly racially based zoning ordinances.

22. 422 U.S. at 505 (emphasis added).

23. 426 U.S. 26 (1976).

finding that whether the exercise of the Court's remedial powers would result in the availability of such services was a matter of pure speculation. The opinion indicated that "it is just as plausible that the hospitals to which respondents may apply for service would elect to forego favorable tax treatment . . . ."[24] The Court rejected as mere "conflicting evidence" proof by the petitioners that at least some local hospitals were sufficiently dependent on favorable tax treatment that a changed policy towards indigents would necessarily result from a favorable decision.[25]

The decisions in *Linda R. S., Warth,* and *Simon* indicate a basic reluctance to entertain cases in which allegedly unconstitutional governmental action is combined with the independent acts of third parties to cause harm to the plaintiff. The fact that a judicial decree in *Linda R. S.* requiring non-discriminatory enforcement of child-support laws would only *tend* to make support for the plaintiff more likely—as opposed to assuring it—was considered fatal. Since the plaintiffs in *Warth* and *Simon* failed to clearly prove that they would receive housing and hospital care respectively, even if they won on the merits, their claims were also dismissed. A similar situation in *Duke Power,* however, provided a sufficient basis for standing.

The *Duke Power* plaintiffs claimed various harms from the operation of the nuclear plants. But if the requested relief were granted, *i.e.,* if the Price-Anderson limitation were declared unconstitutional, it is far from clear whether the nuclear plants would have been abandoned. The Duke plants were well on the road to completion at the time the trial court decision was rendered; great expense and capital investment had already been made. No doubt, the final decision as to whether or not to abate the activity that led to the claimed harms rested solely within the discretion of Duke Power Company.[26]

The trial court concluded that Duke Power would be unlikely to be able to finish and operate the plants without the limitation.[27] The opinion below primarily outlined a "but for"

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24. *Id.* at 43.

25. *Id.* at 43-44.

26. 438 U.S. at 77 n.22.

27. 431 F. Supp. at 203. Duke Power stated for the lower court that it would finish construction of all plants regardless of any adverse decision concerning the

relationship between the Price-Anderson Act and the original determination by the private sector in general, and Duke Power in particular, to enter the nuclear power industry. Further, in sustaining the trial court determination, the Supreme Court focused on the industry's general unwillingness to commit itself to nuclear power absent the limitation. But the sentiment of *Linda R. S., Warth,* and *Simon* demands not only a clear showing that the govermental activity helped cause the injury but also a demonstration that if the requested relief is forthcoming the claimed injury would be *removed.*

For example, the analysis in *Linda R. S.* did not turn on whether the delinquent father refused to support his child because of the discriminatory enforcement of the Texas statute. Rather, the Court demanded a showing that a judicial decree of the unconstitutionality of discriminatory enforcement would indeed result in payment to the plaintiff. Similarly, in *Simon,* the examination was not whether the revenue ruling in question caused the denial of hospital access to indigents, but whether a decision striking down the ruling would result in hospital treatment for the poor. In both instances, standing was denied because a judicial decree on the merits could have been rendered meaningless if contrary action by a third party was forthcoming.

In *Duke Power,* the Court determined that the limitation caused the development of the private nuclear power industry. There was no significant consideration given, however, to the more difficult question of whether, given the removal of the Price-Anderson limitation, Duke Power Company would make the decision to let two substantially developed nuclear power plants sit idle. Only if such a decision were made would plaintiffs' injuries be removed. Further, the record revealed direct testimony by Duke Power officials that they would attempt to proceed with the plants even in the absence of Price-Anderson.[28] Had the plaintiffs prevailed on the merits and Duke Power continued with the plants, the Court's decision would have been rendered purely gratuitous as a vehicle for removing the injuries upon which standing was based.

Given the factual situation in *Duke Power,* a strong argument can be made that plaintiffs were no more certain of

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Price-Anderson Act. *Id.* at 218.

28. 438 U.S. at 77 n.22.

achieving effective relief than were the petitioners in *Linda R. S., Warth,* and *Simon.* But in those cases, the Court dealt with challenges to governmental practices, the merits of which it was less anxious to reach. In *Duke Power,* it was determined that the "court's remedial powers would redress the claimed injuries"[29] without significant scrutiny of the real questions involved.

It is reasonably clear that the tough application of the causation requirement in *Linda R. S., Warth,* and *Simon* was undesirably rigid in that it denied a forum to strong constitutional claims when the litigants had aptly shown a sufficiently concrete "personal stake in the outcome of the controversy."[30] The refusal to apply the requirement strictly in *Duke Power* was the first signal that, in order to render a decision supporting the constitutionality of Congress' involvement in the nuclear power industry, the Burger Court was more than willing to suspend its past standing and jurisdictional[31] guidelines.

The Nexus Requirement

Having determined the plaintiffs' injuries likely to be redressed, the Court next considered the relationship, if any, required between the injuries claimed for purposes of standing and the alleged unconstitutional activity. The plaintiffs had alleged present injuries to health, property, and environment from the operation of the plants, but those injuries were unrelated to the fifth amendment attack on the Price-Anderson Act. Undeniably, even if the limitations were five times $560 million, the immediate adverse effects of the plants' operations would be the same. Indeed, if the limitation were irrationally based, the plaintiffs could claim a due process violation only if one of the plants exploded. The alleged irrationality of the limitation could not be seen as providing a right to prevent injuries caused by the plants in the normal course of operation. As a result, if a nexus were required between the injuries claimed and the rights invoked, standing would have been denied.[32]

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29. *Id.* at 74.

30. Baker v. Carr, 369 U.S. 186, 204 (1962).

31. Justices Rehnquist and Stevens argued in concurring opinions that there was jurisdiction over neither the Nuclear Regulatory Commission nor Duke Power Company. 438 U.S. at 95 (concurring opinion).

32. The only injury possessing the required subject-matter nexus to the due

The Court escaped such a conclusion in the instant case by distinguishing it from its predecessors on the grounds that the nexus requirement applies only to taxpayer suits. Of course, *Flast v. Cohen*[33] and its progeny required that a taxpayer establish a nexus between that status and the "precise nature of the constitutional infringement alleged."[34] *Duke Power*, however, ruled that in suits where taxpayer status is not the basis for standing, such requisites will be served by the article III requirement of an injury-in-fact redressable by the requested relief.[35]

The Court specifically denied Duke Power Company's allegation that the plaintiffs lacked standing, stating that

> no cases have been cited outside the context of taxpayer suits where we have demanded this type of subject matter nexus between the right asserted and the injury alleged and we are aware of none.[36]

The foregoing pronouncement must be considered rather bold in light of the following language from *Linda R. S. v. Richard D.*, where standing was not based on the party's taxpayer status:

> Appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention . . . . As this Court made plain in *Flast v. Cohen* . . . a plaintiff must show a logical nexus between the status asserted by the litigant and the claim sought to be adjudicated . . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial

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process challenge is the speculative injury that would result from a nuclear accident causing damages in excess of the liability limitation. If, however, the Court had been willing to recognize injury based upon the chilling effect inherent in the possibility of injury without adequate compensation, a present injury with the required subject-matter nexus could have been found.

33. 392 U.S. 83 (1968). Plaintiffs brought suit alleging that disbursements to sectarian schools violated the establishment and free exercise clauses of the first amendment. Granting the plaintiffs the right to maintain the action, the Court held that in addition to the nexus requirement, the taxpayers must establish a logical link between their status as taxpayers and the type of enactment attacked, as it would not be sufficient to allege incidental expenditure of tax funds in order to achieve standing. *Id.* at 102-03.

34. *Id.* at 102.

35. 438 U.S. at 79.

36. *Id.* at 78-79.

power.[37]

The declarations set forth above in *Linda R. S.* were dismissed as dicta in a footnote to the *Duke Power* opinion.[38]

By choosing to see the question of the relationship between the claims asserted and the injuries alleged as merely a decision of whether to extend the nexus requirement beyond the taxpayer context, the Court successfully dodged the tougher issues presented. As Mr. Justice Stewart stated in his concurring opinion, "Surely there must be *some* direct relationship between the plaintiff's federal claim and the injury relied on for standing."[39] For example, assume that a competing coal-fired power station operated within a short distance of the nuclear plant. If such a plant claimed that the Price-Anderson Act violated its rights to due process by arbitrarily limiting its recovery in the event of a nuclear disaster, could standing be based on a present injury-in-fact due to lost revenues as a result of the nuclear competitor?

An affirmative holding in the above example would be inconsistent with the general standing mandate that the "constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[40] Can a due process challenge to a law limiting liability in the event of a nuclear catastrophe be seen as granting a plaintiff the right to assert a claim based upon a change in the water temperature of a local lake? Certainly no definitive answer to such questions can be drawn from the decision in *Duke Power*. The Court was apparently so determined to find standing in order to sustain the constitutionality of the Price-Anderson Act that difficult questions regarding the "case or controversy" requirement were treated only superficially.

Unfortunately, proponents of liberal standing guidelines have no cause to feel heartened. On the surface, *Duke Power* could be seen as a relaxation of the Court's previously rigid applications of the causation and nexus requirements. But the decision was careful to point out the existence of "general

37. 410 U.S. at 617-18.
38. 438 U.S. at 79 n.24.
39. *Id.* at 95 (Stewart, J., concurring in the result).
40. 422 U.S. at 500.

prudential concerns"[41] aimed at limiting the role of courts in a democratic society, as embodied in such cases as *Warth v. Seldin*,[42] *Schlesinger v. Reservists To Stop The War*,[43] and *U.S. v. Richardson*.[44] The meaning of such references should be clear: the *Duke Power* decision represents merely a temporary suspension of standing requisites based upon the desire to clear up any lingering constitutional doubts with regard to Congress' involvement in the nuclear power industry. That suspension was based largely on the need, as expressed by both the Nuclear Regulatory Commission and the private nuclear power industry,[45] for a Supreme Court decision delineating the constitutional validity of the Price-Anderson Act.

THE MERITS: CONSTITUTIONALITY OF THE PRICE-ANDERSON ACT

Although the standing analysis is of interest as an indicator of how anxious the Court was to decide the substantive claims made by the plaintiffs in *Duke Power*, it is only a thorough consideration of the decision rendered on the merits that clearly demonstrates the full extent of the deaf ear that the Court will apparently turn to any future challenge to federal nuclear power policy. The district court had held the Price-Anderson Act constitutionally infirm in two respects. First, the Act violated the due process clause of the fifth amendment because it allowed "the destruction of the property or lives of those affected by nuclear catastrophe without reasonable certainty that the victims will be justly compensated."[46] Second, it ran afoul of the equal protection requirement because it provided a benefit to the whole of society, yet it "place[d] the cost of that benefit on an arbitrarily chosen seg-

41. 438 U.S. at 80.

42. 422 U.S. 490 (1975).

43. 418 U.S. 208 (1973).

44. 418 U.S. 166 (1973). Plaintiff was denied standing in a suit to have the Central Intelligence Agency Act declared unconstitutional. The Court relied on Frothingham v. Mellon, 262 U.S. 447 (1923), to support the proposition that a taxpayer may not use the federal courts simply as a forum to air his grievances about the conduct of the federal government.

45. *See* Brief of the Nuclear Regulatory Commission at 5-7; Brief of American Public Power Association at 4; Brief of Atomic Industrial Forum at 35-41; Brief of Babock & Wilcox at 10-13; Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978).

46. 431 F. Supp. at 222.

ment of society, those injured by nuclear catastrophe."[47] The Supreme Court reversed both holdings.

The primary legal question faced on the merits, as is often the situation in due process and equal protection analysis, was the determination of the appropriate standard of review. The defendants claimed that the Act represented a legislative balancing of economic interests, and, as a result, should be accorded the traditional presumption of validity. CESG, however, argued that the rights involved were of such importance that at least an intermediate standard of review, if not strict scrutiny, was proper. The Court characterized the Act as a "classic example of economic regulation."[48] As a result, the traditional presumption of constitutionality was applied and the Court completely deferred to Congress' legislative decision. Therefore, the determination that the Price-Anderson Act involves classic economic regulation was tantamount to a holding that the Act was nonreviewable.

An Appropriate Standard of Review

Modern due process and equal protection analysis has developed on the basis of an essentially two-tiered standard of review. Since the downfall of the exercise of formal substantive due process,[49] legislative enactments dealing with social or economic interests have been accorded a strong presumption of validity, subject to attack only if demonstrated to be arbitrary or irrational.[50] If, however, a governmental policy interferes with the exercise of a "fundamental" right, the policy is constitutionally defective unless it can be shown to be necessary to carry out a compelling or overriding governmental interest.[51] Similarly, if a law burdens a class of persons determined to be constitutionally "suspect," the Court will subject the law to "strict scrutiny" to see if it promotes a compelling

47. *Id.* at 225.

48. 438 U.S. at 83.

49. Nebbia v. New York, 291 U.S. 502 (1934).

50. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Reviewing a proceeding under the Federal Declaratory Judgment Act to challenge the constitutionality of an Oklahoma statute dealing with visual care, the Court held that a law need not be logically consistent with its aims in order to be adjudged constitutional, and where there is an evil at hand, rational measures to correct it will be upheld. *See also* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

51. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

state interest.[52] An intermediate standard has been used in certain sex-based discrimination cases requiring that the legislative enactment "serve important governmental objectives and . . . be substantially related to the achievement of those objectives."[53] The Price-Anderson Act obviously involved no suspect classification or discrimination based on sex. In refusing to consider Price-Anderson's provisions under an elevated standard of review, however, the Court turned its back on interests of the plaintiffs crucial to their very existence and, indeed, as explicitly protected by the fifth amendment as many rights characterized as "fundamental" in previous decisions.

The interests asserted. The determination of the proper standard of review necessitates an analysis of the rights and interests of the plaintiffs that are affected by the contested statute. The Price-Anderson Act was attacked as an unreasonable limitation of liability; *i.e.*, the plaintiffs might be forced to settle for inadequate compensation in the event of a nuclear catastrophe. Furthermore, to distinguish these plaintiffs from victims of other potential disasters, by way of the limitation, allegedly constituted a violation of their right to equal protection of the laws. Seen merely in this light, a rational argument can be made that the plaintiffs were making a claim based solely on dollars and cents, thereby contesting the amount of compensation they should receive in the event of the disaster. Under such a rationale, the Court concluded the Price-Anderson Act was "a legislative effort to structure and accomodate the burdens and benefits of economic life."[54] Deference to Congress' determination was thus applied.

But were the plaintiffs asserting mere economic rights? Such a determination was certainly convenient for the Court. While, for purposes of standing, the Court felt free to consider the entire panoply of injuries sustained by the surrounding residents, when it came down to a determination of the merits, the action was narrowly viewed as an example of "classic economics".

The trial court made, *inter alia*, the following explicit

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52. McLaughlin v. Florida, 379 U.S. 184, 192-93 (1964).

53. Craig v. Boren, 429 U.S. 190, 197 (1976). *See* Reed v. Reed, 404 U.S. 71 (1971). *See also* Gunther, *Foreword: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Laws*, 87 HARV. L. REV. 1 (1973).

54. 438 U.S. at 83.

findings of fact:

> The Court finds as a fact that the probability of a major nuclear accident producing damages exceeding the $560,000,000 limit of the Price-Anderson Act is not fanciful but real . . . .
>
> It is not the kind of risk which responsible government or business places upon bystanders.
>
> . . . .
>
> The Court finds . . . that a core melt at McGuire or Catawba can reasonably be expected to produce hundreds or thousands of fatalities, numerous illnesses, genetic effects of unpredictable degree and nature for succeeding generations, thyroid ailments and cancers in numerous people, damage to other life and widespread damage to property. Areas as large as several thousand square miles might be contaminated and require evacuation.[55]

The lawsuit was cast in terms of the rationality of the limitation, and to that end, economic analysis was involved. Characterization of the plaintiffs' interests in such a fashion, however, is painful. Certainly the interests sought to be promoted by the local residents were of a more important character than the business interests asserted in most instances of economic regulation.[56] Further, as discussed below, the interests asserted were more closely tied to explicit constitutional guarantees than certain areas of "social" regulation to which the Court has also accorded a strong presumption of constitutionality.[57]

The trial court decided not only that the limitation was irrational and thus a violation of due process, but it also violated equal protection principles by providing a benefit to the whole of society by placing "the cost of that benefit on an arbitrarily chosen segment of society. . . ."[58] Thus, the Act created a de facto classification distinguishing between society at large and those persons dangerously close to nuclear power plants. But what is the "burden" placed on such local residents as a result of the Price-Anderson Act?

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55. 431 F. Supp. at 214.

56. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

57. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

58. 431 F. Supp. at 225.

Certainly the possibility of mass destruction without a guarantee of adequate compensation is part of the burden; the adequacy of compensation was, in fact, the only interest considered by the Court in *Duke Power*. Early in the opinion, however, the Court specifically accepted the trial judge's finding that but for the Price-Anderson limitation there would be no nuclear plant.[59] As a result of the limitation, then, the petitioners suffered a myriad of adverse effects from the operation of the plants. These injuries, which the Court was so willing to consider for purposes of standing, included harm from the emission of low-level radiation with commensurate latent injuries, birth defects and cancer, and the present objective fear of a holocaust destroying life and property. The "burden" on local residents also includes the possibility of severe injury or death as the result of a core melt or other major accident. The trial court explicitly found that these injuries existed and were directly caused by the Price-Anderson Act; the Supreme Court expressly affirmed those findings.[60] Examining the interests asserted by the plaintiffs, the Court erroneously disregarded such direct effects of the Act's limitation.

Equal protection analysis demands careful consideration of the rights and interests affected by the challenged governmental action. Clearly, the victims of the de facto classification resulting from the Price-Anderson Act are subjected not only to the possibility of injury without adequate compensation, but also to both the immediate and potential effects of the operation of nearby nuclear power plants.

As noted above, plaintiffs in *Duke Power,* unlike the population at large, are exposed to low-level radiation and a reasonably objective constant fear of serious injury or death as the result of a core melt. Furthermore, the trial court held that the risk that many of the plaintiffs would actually die as a result of the plant's operations was "real," not fanciful.[61] Yet, the Supreme Court in *Duke Power* took a trial court determination outlining the serious nature of such injuries, accepted those findings, and still refused to exercise any substantive review of the congressional nuclear power subsidy because it found the Price-Anderson Act constituted mere ec-

59. 438 U.S. at 77.
60. *Id.* at 74 n.19.
61. 431 F. Supp. at 214.

onomic regulation. That anlysis is inconsistent with the substantive equal protection review based on the infringement of "fundamental" rights which the Supreme Court has exercised over the past forty years.

The nature of fundamental rights. New equal protection analysis, requiring compelling justification for classifications that burden specially protected interests, originated in *Skinner v. Oklahoma.*[62] In that case, the Court struck down a statute that subjected persons convicted three times of any felony involving moral turpitude to sterilization, yet exempted those similarly convicted of embezzlement. Because the statute dealt with procreation, "one of the basic civil rights of man," the Court held that "strict scrutiny of the classification . . . is essential."[63] Under such scrutiny, the Court willingly looked beyond any presumption of constitutionality in order to determine whether the enactment was narrowly drawn in order to effectuate a compelling interest of the state. Close scrutiny was justified not by the nature of the classification, but by the nature of the interest it regulated.

The doctrine of "fundamental rights" gradually evolved to include the right to vote,[64] the right to travel between states,[65] freedom of association,[66] the right to counsel for post-conviction appeals,[67] and a general right to privacy.[68] In subsequent years, however, it became clear that the characterization of rights as fundamental was not to become the functional equivalent of the old substantive due process. Despite the relative social importance of such interests as subsistence welfare payments,[69] adequate housing,[70] government employment,[71] and education,[72] the Court has thus far refused to declare them fundamental.

In *San Antonio Independent School District v. Rodri-*

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62. 316 U.S. 535 (1942).
63. *Id.* at 541.
64. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
65. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Quest, 383 U.S. 745, 757 (1966).
66. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
67. *See* Douglas v. California, 372 U.S. 353 (1963).
68. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
69. *See* Dandridge v. Williams, 397 U.S. 471 (1970).
70. *See* Lindsey v. Normet, 405 U.S. 56 (1972).
71. *See* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).
72. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

quez,[73] while making the determination that the right to education was not fundamental and did not merit strict scrutiny, the Court rendered its most definitive ruling on the scope of the fundamental rights doctrine:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing . . . . *Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.*[74]

Rodriquez was not, however, a portent of the demise of the fundamental rights doctrine. The abortion cases,[75] for example, emphasized that there remain concepts of fundamental rights, including the right to privacy, either explicit or implicit in the Constitution. Recently, in *Zablocki v. Redhail*,[76] the Court struck down a Wisconsin statute that required a resident, having minor dependent children not in his custody, to obtain a court's permission before remarrying. In reaching its decision, the Court again characterized the right to marry as fundamental thus requiring an elevated standard of review.

Whatever the present status of the new equal protection doctrine in general, or the fundamental rights concept in particular, the interests of American citizens in protecting themselves from substantial governmental abridgement of their rights to life, to health, and to the maintenance of a certain zone of privacy are sufficiently "implicit in the concept of ordered liberty"[77] that the Court has, in the past, substantively reviewed the acts of other branches of government when such rights were put in jeopardy. The basis of the claim to such rights was aptly described by the late Justice Douglas:

> The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the peo-

73. 411 U.S. 1 (1973).
74. *Id.* at 33 (emphasis added).
75. *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).
76. 434 U.S. 374 (1978).
77. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

> ple." But a catalogue of these rights includes customary, traditional, and time honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them . . . come within the meaning of the term "liberty" as used in the Fourteenth Amendment.
>
> . . . .
>
> These rights, unlike those protected by the First Amendment, are subject to some control by the police power. . . . These rights are "fundamental," and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation.[78]

The plaintiffs in *Duke Power* demonstrated that the Price-Anderson Act endangered their health on an immediate basis and constituted a "real" threat to their very lives. That threat must be considered a significant intrusion into rights guaranteed in the Constitution. The fourteenth amendment provides that no person shall be "deprived of life, liberty, or property without due process of law." Accordingly, a fundamental right to life and liberty encompassing the right to be free from the threat of personal destruction through nuclear accident is consistent with the requirement that an elevated standard of review be employed for the protection of rights explicitly or implicitly guaranteed by the Constitution.

Moreover, it is clear that other rights previously characterized as fundamental, *e.g.*, the right to procreate,[79] to marry,[80] to use contraceptives,[81] to direct the education of one's children,[82] and to be free from unreasonable police stops and other intrusions[83] would all be rendered meaningless if not coupled with a strong guarantee against unreasonable threats to life and health by either the state or federal government. One can take little solace in the knowledge that his freedom to use contraceptives or to travel to a neighboring state is constitutionally protected, if a similar guarantee of

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78. Doe v. Bolton, 410 U.S. 179, 210-11 (1973) (Douglas, J., concurring).
79. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).
80. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).
81. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
82. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1924).
83. *See* Terry v. Ohio, 392 U.S. 1 (1967); Katz v. United States, 389 U.S. 347 (1967).

freedom from intentional governmental action which puts his life in peril is not maintained.

Understandably, the characterization of any right as either fundamental or non-fundamental leaves much to be desired. The two-tiered approach to substantive review is obviously conclusory in nature and application. Thus, the creation or recognition of further rights, and the bestowing of the title "fundamental" on those rights is open to a certain degree of criticism. In the debate over such nomenclature, however, we would do well to recognize the reason for the development of such a doctrine in the first place.

It cannot be denied that a general presumption of constitutionality has merit in order to ensure that federal courts do not become the true and final repositories of legislative power. But when governmental actions significantly infringe upon rights either expressly or implicitly guaranteed by the Constitution, meaningful judicial review must be made available in order to prevent the Constitution from becoming an empty, toothless document. Whether that review is characterized as strict scrutiny resulting from the fundamental nature of the right is of little importance. What is absolutely essential, however, is that the federal courts engage in substantive review of the legislative enactment to ensure that those rights guaranteed by the Constitution are not being sacrificed.

The failure of the Supreme Court adequately to review Price-Anderson's threat is the ultimate mistake made by the Court in *Duke Power*. Review under the traditional rational basis test is, of course, no review at all. Accordingly, the decision in *Duke Power* can only be seen as a true abdication of judicial power and responsibility.

The interests advocated by the petitioners in *Duke Power* should not be equated with any claimed constitutional right to clean air and water, although it is certainly true that air pollution can prove harmful to life on a long-term basis. The Constitution, however, is an inappropriate tool to ensure that modern life, and the role of federal and state governments in that life, is totally free from risks and impediments to good health. Such protections are more properly fashioned by legislative bodies. But federal involvement in an activity that, according to the findings of the trial court, poses a real possibility of "hundreds or thousands of fatalities . . . illnesses . . .

[and adverse] genetic effects,"[84] raises a quite different concern. Government activity that directly and substantially interferes with a citizen's right to be let alone in the enjoyment of his health and security at least merits some degree of scrutiny by the judicial system. Nor can the side effects of nuclear power be dismissed out-of-hand by the Aourt as the necessary result of progress. Rather, the objectively reasonable risk of widespread injury and death which the Court indirectly dealt with in *Duke Power* concerns rights expressly guaranteed by the Constitution. By according the Price-Anderson Act a strong presumption of constitutional validity and thus reviewing its provisions under a rational basis test, the Court refused to carry out its responsibilities as protector of life and liberty of American citizens.

The necessity of an elevated standard of review. There is no doubt that a decision striking down the Price-Anderson Act would be a difficult one. The competing state aims involved—promotion of the private nuclear power industry and compensation for potential nuclear accident victims—may both constitute compelling state interests. The Court would necessarily be taking action in a field in which the legislative branch possesses greater expertise, as well as dealing indirectly with energy policy issues more appropriately handled by Congress. Due process and equal protection analyses, as those bodies of law have developed over the past thirty years, have required that the federal judiciary closely scrutinize legislative enactments that infringe upon certain constitutionally protected rights. Such scrutiny is necessary because governmental abridgement of essential liberties is at odds with the concept of freedom upon which our society is based.

As the discussion above indicates, the rights asserted by the plaintiffs in *Duke Power* are not only expressly protected in the Constitution but are crucial to the rational development of any free society. Because of the nature of the rights asserted, it was entirely inappropriate for the Court to review the Price-Anderson Act under the rational basis test. Unless the past thirty years of substantive review based upon fundamental rights is to be rewritten by the present Court, there can be no valid basis for a decision that the interests asserted in *Duke Power* constitute mere economic concerns and there-

84. 431 F. Supp. at 214.

fore enjoy a presumption of constitutionality.

An elevated standard of review would require the Court to look closely at the compelling governmental interests embodied in the Price-Anderson Act and the methods used to accomplish such goals. Certainly the energy needs of this country are crucial. But under strict scrutiny analysis, alternatives that may potentially be less burdensome to the rights of local residents would be examined.[85] The trial court suggested other rational courses, such as making nuclear accidents a national loss with compensation for the injured coming from the federal treasury, or creating a liability pool with all nuclear power plants contributing—thus placing the cost of nuclear accidents more squarely on the customers and company stockholders rather than on the victims.[86]

CONCLUSION

Duke Power is a decision in which the Supreme Court temporarily took an expansive view of traditional standing requirements in order to determine the constitutionality of the Price-Anderson limitation. On the merits, however, a strong presumption of validity was accorded the statute and it was, therefore, upheld without significant judicial scrutiny. In light of the interests at stake, an elevated standard of review was more appropriate, and the failure of the Court to so exercise its constitutional duty was unfortunate.

It is important to note that the issues examined in *Duke Power* were not characterized as political questions and, as a result, inappropriate for judicial review. Rather, the Court undertook to rule on the merits of the Price-Anderson Act, but did so under an unduly deferential substantive standard. Of course, a final determination of Price-Anderson's substantive validity was essential for the peace of mind of the nuclear industry—the investing private sector. In the end, that need was the ultimate reason for both the standing decision and the ruling on the merits.

Ultimately, it makes little difference whether past decisions mandated that the Court apply strict scrutiny in reviewing the Price-Anderson Act or accord it a strong presumption of constitutionality. At trial, the plaintiffs proved that, as the

85. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972).
86. 431 F. Supp. at 214.

result of a federal statute, they were placed in reasonable apprehension of a core melt or other accident potentially threatening their lives. Regardless of whether such a threat abridges a fundamental right, if the Supreme Court is to function as a viable institution regarded as our ultimate guarantor of civil liberties, interests as crucial to human freedom as those advocated by the plaintiffs in *Duke Power* must provide the basis for substantive judicial review.

The decision in *Duke Power* recognizes that the plaintiffs' lives are endangered; the trial court's findings were unequivocal in that regard. The recent accident at Three Mile Island should impress all with the reality of the dangers associated with nuclear power. Yet the Court merely questions whether Congress' decision to abridge the plaintiffs' rights to life and health was reasonably motivated. No consideration of the serious constitutional deprivation was made, nor did the Court ensure that the means employed in the Act were narrowly drawn to serve its aims. In short, the Court refused to consider the propriety of less burdensome alternatives. Rather, the decision effectively states: "Complain to Congress." Yet if Congress is the source of the constitutional deprivation, reliance on the political process may be meaningless. Moreover, an individual's right to be secure in his physical well-being should not turn on his ability to convince the majority of his fellow citizens not to harm him.

An ultimate determination of the constitutionality of the federal decision to subsidize nuclear power presents monumental questions and problems of conflicting interest that are not easily reconciled. The answer, however, does not lie in a Court which closes its eyes, turns its back, and says, "there are no major dangers . . . like Pollyanna . . . 'everything will turn out all right.' "[87] If that is indicative of the stance of the federal judiciary, then the Court's role in our society will necessarily be an unimportant one. If the Supreme Court is to have any credibility, it must be capable of handling such questions of ultimate import. If the Court chooses not to accept this responsibility, however, those persons actively seeking the assurances of liberty may be forced to disregard the legal system and seek other means of protection.

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87. *Id.* at 225.